(13)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

OBEAR-NESTER GLASS COMPANY,
Petitioner,
v.
UNITED DRUG COMPANY,
Respondent.
No. 416.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

LAWRENCE C. KINGSLAND,
EDMUND C. ROGERS,
705 Olive Street,
St. Louis (1), Missouri,
Counsel for Petitioner.

KINGSLAND, ROGERS & EZELL,
Of Counsel.

St. Louis, Missouri,
November 21, 1945.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

OBEAR-NESTER GLASS COMPANY,
Petitioner,
v.
UNITED DRUG COMPANY,
Respondent.
No. 416.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

This is a petition for rehearing of the denial by this Court on November 5, 1945, of petitioner's Petition for Certiorari, filed herein September 10, 1945.

The pertinent facts are:

1.

Petitioner prevailed in a suit against respondent for infringement of petitioner's trade mark REX, registered under the Federal Trade Mark Act of 1905. Petitioner was awarded an injunction and an accounting.

2.

On the accounting, petitioner proved the amount of respondent's sales, and rested its prima facie case on profits. Petitioner made no other proof on the accounting, as to profits. Specifically, petitioner made no effort to prove, as part of its prima facie case on the accounting, that respondent's sales, or any part of them, were the products of confusion of purchasers. At the close of petitioner's prima facie case, respondent rested, taking no testimony.

Petitioner intentionally made no prima facie proof of profits beyond the amount of defendant's sales. Petitioner relied upon the clear statements of this Court in the **Mishawaka** case, 316 U. S. 203.

3.

The tribunals below held that petitioner could not recover any profits from respondent, because there was no proof that respondent's sales resulted from confusion.

4.

Petitioner thus, by following what this Court declared in unmistakable words, has been denied any day in Court on the issue of what profits respondent earned because of confusion.

The reasons for asking rehearing on petitioner's petition for certiorari are:

I.

The original petition must not have made it clear that the decisions below are in flat contradiction to what this Court held in the **Mishawaka** case.

II.

The effect of having a clear pronouncement of this Court rebound in the face of litigants in a frequently occurring branch of the law was not made clear.

III.

The fact that the statements made by this Court in the **Mishawaka** case have actually developed into a trap for litigants was not made clear.

IV.

The fact that a matter of great public interest, involving conflict not only with a decision of this Court, but also with decisions of the circuit courts of appeals, was involved, was not made clear.

DISCUSSION.

I.

This Court in **Mishawaka Woolen Mfg. Co. v. S. S. Kresge Co.**, 316 U. S. 203, set forth a very specific procedure for trade mark accountings. Petitioner followed that procedure, assuming that it was not only proper, but sufficient. The courts below held that what this Court declared proper and sufficient was insufficient. The lower courts denied petitioner its recovery on the ground that petitioner had not proved its case, **although petitioner did all that this Court had declared necessary.**

II.

In other words, this Court declared in unmistakable terms that a winning plaintiff in a trade mark accounting, to establish its full prima facie case, need prove only the total sales of the defendant. Petitioner proved respondent's total sales, and rested its prima facie case. Respondent

offered no testimony whatever on the accounting that any of its sales resulted from anything other than the presence of the infringing trade mark.

Yet the courts below held that petitioner could not recover anything at all, because it, **petitioner**, had not proved that any sales came about because of confusion.

III.

The foregoing is a flat reversal of the rule declared by this Court in the **Mishawaka** case. Petitioner would have undertaken the burden to establish confusion in particular sales, if this Court had not specifically stated that a winning plaintiff in an accounting under 316 U. S. 203 is not required to do so.

IV.

The action of the courts below denied petitioner any day in Court on this issue. For petitioner, believing this Court intended what is the obvious meaning of its words used in the **Mishawaka** case, offered no proof on this issue of specific instances of confusion. Neither did respondent. The courts below held that petitioner had not sustained its burden, despite what this Court said. Therefore, relying upon the declaration of this Court as being the law, petitioner lost its day in Court. We should be less than frank if we did not express our feeling that this Court bears responsibility for our having failed to have our day in Court. If we had not relied upon what this Court said in the **Mishawaka** case, we would have proved the existence of confusion.

V.

We still believe that the **Mishawaka** case is the proper law. Yet it is not only not the controlling law in the Eighth Circuit, but actually is a trap for the unsuspecting

litigant. Many who follow in this active branch of the law will be trapped in the same way this petitioner was trapped.

VI.

We submit that the only way to rectify this impossible situation is for this Court to take action, and declare whether what it said in the **Mishawaka** case is the law, or not. As long as the **Mishawaka** case stands, it is either the law or a trap.

There is no middle ground. Either a winning plaintiff in a trade mark accounting under 15 U. S. C. 99 satisfies his full prima facie proof by establishing the defendant's total sales; or he does not satisfy it.

VII.

It is respectfully requested that the matter of petitioner's Petition for Writ of Certiorari herein, filed September 10, 1945, be reconsidered, and granted.

VIII.

It is certified by the undersigned that this petition is made in good faith, without intention of delay, and that its contents are believed to be true.

Respectfully submitted,

OBEAR-NESTER GLASS COMPANY,
By LAWRENCE C. KINGSLAND,
EDMUND C. ROGERS,
Counsel for Petitioner.

KINGSLAND, ROGERS & EZELL,
Of Counsel.